Appendix

United States Circuit Court of Appeals
Tenth Circuit

Nos. 2792-2793-2794-2795-2796-2797-2798-2799

JANUARY TERM, 1944.

FRANKFORT DISTILLERIES, INC., *Appellant,*
2792 vs.
UNITED STATES OF AMERICA, *Appellee.*

NATIONAL DISTILLERS PRODUCTS CORPORATION, *Appellant,*
2793 vs.
UNITED STATES OF AMERICA, *Appellee.*

BROWN FORMAN DISTILLERS CORPORATION, *Appellant,*
2794 vs.
UNITED STATES OF AMERICA, *Appellee.*

HIRAM WALKER, INC., *Appellant,*
2795 vs.
UNITED STATES OF AMERICA, *Appellee.*

SCHENLEY DISTILLERS CORPORATION, *Appellant,*
2796 vs.
UNITED STATES OF AMERICA, *Appellee.*

SEAGRAM-DISTILLERS CORPORATION, *Appellant,*
2797 vs.
UNITED STATES OF AMERICA, *Appellee.*

Appeals from the District Court of the United States for the District of Colorado.

McKESSON & ROBBINS, INCORPORATED, *Appellant,* 2798 vs. UNITED STATES OF AMERICA, *Appellee.*	}	Appeals from the District Court of the United States for the District of Colorado.
J. E. SPEEGLE, *Appellant,* 2799 vs. UNITED STATES OF AMERICA, *Appellee.*	}	

[February 28, 1944.]

W. W. Grant (Morrison Shafroth and Henry W. Toll were with him on the brief) for Appellants Frankfort Distilleries, Inc., Seagram-Distillers Corporation, McKesson & Robbins, Inc., and J. E. Speegle; and (Morris Rifkin was with him on the brief) for Appellant J. E. Speegle.

William V. Hodges (Hodges, Vidal & Goree were with him on the brief) for Appellant National Distillers Products Corporation.

D. L. Street, Peter Holme and Robert E. More were on the brief for Brown Forman Distillers Corporation.

Charles Rosenbaum (A. H. Stuart, Newell W. Ellison, Richard S. Goldman and Edward Miller were with him on the brief) for Appellant Hiram Walker, Incorporated.

Robert S. Marx (Ralph T. Heymsfeld, George R. Beneman, Ira C. Rothgerber, Rothgerber & Appel, and Nichols, Wood, Marx & Ginter were with him on the brief) for Appellant Schenley Distillers Corporation.

George B. Haddock, Special Assistant to the Attorney General (Don W. Marshall, Special Attorney, Wendell Berge, Assistant Attorney General, and Thomas J. Morrissey, United States Attorney, were with him on the brief) for Appellee.

Gail L. Ireland, Attorney General, H. Lawrence Hinkley, Deputy Attorney General, Duke W. Dunbar, First Assistant

Attorney General, and George K. Thomas, Assistant Attorney General, were on the brief of Amicus Curiae.

Before PHILLIPS, BRATTON and MURRAH, Circuit Judges.

BRATTON, Circuit Judge:

The indictment herein containing two counts was returned against twenty-nine corporations and fifty-four individuals. The first count charges a conspiracy to raise, fix, and maintain the wholesale prices of spirituous liquor and wine shipped into Colorado, and the second charges a like conspiracy to raise, fix, and maintain the retail prices of alcoholic beverages shipped into that state, in restraint of commerce among the several states and in violation of section 1 of the Anti-Trust Act, as amended, 26 Stat. 209, 50 Stat. 693, 15 U.S.C.A. § 1. Nineteen of the corporations are engaged in the production of alcoholic beverages outside of Colorado; eight are wholesalers engaged in the business in Colorado of purchasing alcoholic beverages for resale to retailers; one is a wholesale association whose members are wholesalers doing business in the state, hereinafter referred to as Wholesale Association; and one is a retail association whose members are retailers engaged in business in the state, hereinafter called Package Association. Some of the individuals are or were officers or employees of the defendant producers; some are officers or employees of the defendant wholesalers; and some are engaged in the sale and distribution at retail of alcoholic beverages in Colorado. Demurrers and motions to quash the indictment were denied. United States v. Colorado Wholesale Wine & Liquor Dealers Ass'n., 47 F. Supp. 160. Thereafter the United States elected to stand on the second count, and the first was dismissed. The defendants Frankfort Distilleries, Inc., National Distillers Products Corporation, Brown Forman Distillers Corporation, Hiram Walker, Incorporated, Schenley Distillers Corporation, Seagram-Distillers Corporation, McKesson & Robbins, Incorporated, and J. E. Speegle each

entered a plea of nolo contendere and prayed that the court impose sentence in all things as though a plea of guilty had been interposed. Fines were imposed, separate appeals were perfected, and by stipulation the several appeals were presented on a single record.

The second count defines certain terms and delineates the facts with respect to the several defendants being producer, wholesaler, retailer, officer, or employee, respectively. It contains a description of the nature of the trade and commerce involved. Under this head, it sets out that alcoholic beverages are marketed in Colorado by means of a continuous flow of shipments from producers located outside the state through wholesalers and retailers to the consuming public; that beverages shipped and sold in bottles by producers can be sold to retailers there only by wholesalers licensed under the laws of the state; that thus wholesalers and retailers are conduits through which beverages are shipped into the state and sold and distributed to the consuming public; that approximately 1,150,000 gallons of spirituous liquor produced elsewhere are shipped into the state annually for such sale and distribution; that such liquor constitutes more than ninety-eight percent of all liquor consumed within the state; that approximately 800,000 gallons of wine produced in other states are shipped into Colorado annually for sale and distribution to the consuming public; that such wine constitutes more than eighty percent of all wine consumed therein; that substantial amounts of beer produced in other states are shipped into the state for sale and distribution; that alcoholic beverages are distributed to more than 700 retailers in the state by approximately 28 wholesalers; that more than seventy-five percent of the spirituous liquor and wine and substantial quantities of the beer are sold and distributed by the defendant wholesalers; and that all of the liquor and wine, and substantial quantities of the beer, sold and distributed by the

bottle or case to the consuming public, are sold by retailers, including the defendant retailers and other members of defendant Package Association. It then alleges that beginning in or about January, 1936, and continuing to the time of the presentation of the indictment, the defendants combined and conspired to raise, fix, and maintain the retail prices of alcoholic beverages shipped into Colorado from producers located outside the state, by raising, fixing, and stabilizing retail mark-ups and margins of profit; that it was a part of the combination and conspiracy that the defendants from time to time discuss, agree upon, and adopt high, arbitrary, and non-competitive retail prices, mark-ups, and margins of profit, that the defendant associations, wholesalers, and retailers agree upon and undertake a program to persuade, induce, and compel producers, including the defendant producers, and wholesalers, to enter into fair trade contracts affecting every type and brand of alcoholic beverages shipped into Colorado and to establish in and by such contracts, high, arbitrary, and artificial retail prices embodying the high, arbitrary, and non-competitive margins of profit agreed upon, that the defendant Package Association prepare and adopt forms of fair trade contracts acceptable to the defendant retailers and to the other members of the association, agree with producers and wholesalers on the forms of fair trade contracts to be used by such producers and wholesalers, and prepare and circulate among its members bulletins and notices announcing the adoption of fair trade contracts and giving the names of producers and wholesalers entering into them and also the names of those not doing so, that the defendant retailers, through the defendant Package Association, agree to and do patronize only those producers and wholesalers who enter into fair trade contracts embodying such retail prices, mark-ups, and margins of profit, and who require and compel observance of the minimum retail prices established in that manner, agree to and do withhold their patronage from producers and wholesalers who fail or refuse to

enter into such fair trade contracts, and agree from time to time with producers and wholesalers respecting revisions in the retail prices established in and by such fair trade contracts so as to preserve and maintain the retail mark-ups and margins of profit agreed upon, that the defendants, acting in part through the defendants Wholesale Association and Package Association, agree to and do police the high, arbitrary, and non-competitive retail prices, mark-ups, and margins of profit, and require and secure observance of them, agree to and do employ paid executives and investigators to spy upon and embarrass retailers who fail or refuse to observe such retail prices, mark-ups, and margins of profit, and threaten to and do institute or cause to be instituted legal proceedings against retailers who fail or refuse to observe such prices, mark-ups, and margins of profits, that the defendant retailers agree among themselves and with the defendant producers and the defendant wholesalers that retailers selling at prices, mark-ups, and margins of profit lower than those established in the fair trade contracts be deprived of the opportunity to purchase beverages from the defendant producers and the defendant wholesalers, that the defendant retailers threaten to and do boycott wholesalers and producers who supply their products to retailers failing or refusing to observe the retail prices, mark-ups, and margins of profit, that to finance such activities the defendants agree upon and provide for the collection of an extra charge added to the wholesale price, the proceeds to be paid to the defendant Wholsale Association and that defendant in turn to pay a portion of such proceeds to the defendant Package Association, that in order to reduce price competition among retailers, defendant retailers attempt to persuade and induce the authorized officials of Colorado and of the City and County of Denver to reject applications for retail liquor licenses, and that such fair trade agreements be made, agreed upon, and carried out in a manner and for purposes not contemplated by the Miller-Tydings Amend-

ment to the Anti-Trust Act; that the effect of the combination and conspiracy has been to raise, fix, stabilize, and maintain the retail prices of alcoholic beverages shipped in interstate commerce into Colorado and sold and distributed in that state at levels acceptable to and approved by the defendants, to eliminate price competition among the defendant retailers, to eliminate price competition among the members of the defendant Package Association, and to restrain and suppress interstate trade and commerce in alcoholic beverages not covered by fair trade contracts; and that the combination and conspiracy was entered into and carried out in part within the District of Colorado, and further that many of the acts and things were done there.

An indictment is not fatally infirm for vagueness, indefiniteness, and uncertainty if it charges all of the essential elements of the offense in such manner as to advise the accused of the nature and cause of the accusation against him, and to enable him to prepare his defense and plead the judgment of conviction or acquittal in bar to a subsequent prosecution for the same offense. Evans v. United States, 153 U.S. 584; Cochran and Sayre v. United States, 157 U.S. 286; Rosen v. United States, 161 U.S. 29; Bartell v. United States, 227 U.S. 427; United States v. Behrman, 258 U.S. 280; Wong Tai v. United States, 273 U.S. 77; Hagner v. United States, 285 U.S. 427; United States v. Safeway Stores, — F.(2d) —. This count charges in general language the essential elements of the offense sufficiently for such purposes. And if the means of effectuating the conspiracy are not set out with the required detail and particularity, the remedy is to apply for a bill of particulars. Glasser v. United States, 315 U.S. 60; United States v. Safeway Stores, supra.

In a case of this kind there is jurisdiction either in the district where the conspiracy was formed or in the district where some act was done pursuant to it. The allegations that the con-

spiracy was entered into and carried out in part within the District of Colorado and that the defendants did within that district many of the acts charged were sufficient for jurisdictional purposes to lay venue there. Hyde v. United States, 225 U.S. 347; Brown v. Elliott, 225 U.S. 392; United States v. Trenton Potteries, 273 U.S. 392; United States v. Socony-Vacuum Co., 310 U.S. 150; United States v. Safeway Stores, supra.

The Twenty-first Amendment does not strip the national government of all authority to legislate in respect of interstate commerce in intoxicating liquor. Hayes v. United States, 112 F.(2d) 417; Washington Brewers Institute v. United States, 137 F.(2d) 964. But it does sanction the right of a state to legislate concerning the importation of such liquor from other states, unfettered by the Commerce Clause. Ziffrin, Inc. v. Reeves, 308 U.S. 132; Cf. Carter v. Virginia, — U.S. —. In this connection, Colorado has a Fair Trade Act, chapter 146, Laws of 1937; an Unfair Practices Act, chapter 261, Laws of 1937; and a Liquor Code, sections 15-47, chapter 89, Colorado Statutes Annotated of 1935. Under section 1 of the Fair Trade Act a contract relating to the sale or resale of a commodity bearing the trade-mark, brand, or name of the producer or distributor, and which commodity is in free and open competition, shall not be deemed in violation of any law of the state by reason of providing that the buyer will not resell such commodity at less than the minimum price stipulated by the seller or that the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not resell at less than the minimum prices stipulated by the seller. Section 3 of the Unfair Practices Act provides that it shall be unlawful for anyone engaged in business in the state to sell, offer for sale, or advertise for sale, any article or product for less than the cost thereof to the vendor, or give, offer to give, or advertise the intent to give away any article or product for the purpose

of injuring competitors and destroying competition. Section 17 of the Liquor Code, as amended by chapter 160, Laws of 1941, makes it unlawful wilfully and knowingly to advertise, offer for sale, or sell vinous liquors, spirituous liquors and alcoholic beverages at less than the price stipulated in any contract entered into pursuant to the provisions of the Fair Trade Act; section 29 provides for a manufacturer's license, a wholesaler's license, and a retail liquor store license; and section 20 authorizes the licensing authority, created by the preceding section, to make rules and regulations pursuant to the licensing provisions. Regulation 1(3) promulgated under the Liquor Code provides that all spirituous liquor sold or transferred within the state must be affixed with the proper stamps before sale or transfer, and that wholesalers shall affix the proper stamps upon all liquor sold by them within the state to retailers or consumers prior to delivery; and regulation 12 C provides that all alcoholic liquor shall be the sole and exclusive property of and subject to the unrestricted power of disposal of a duly licensed Colorado wholesale deader, as defined in the Liquor Code, at the time such liquor crosses the state line coming into the state for the purpose of being sold, offered for sale, or used there. Appellants point with emphasis to these statutes and regulations as constituting legal warrant for the fair trade agreements referred to in the indictment. And, justifying his appearance in the case by reference to the observation of the court in Washington Brewers Institute v. United States, Supra, that significantly no state had appeared as a friend of the court to protest the enforcement of the Anti-Trust Act, the Attorney of Colorado filed in this cause a brief as amicus curiae, calling attention to these statutes and regulations and contending that the fair trade contracts described in the indictment were entered into under the Fair Trade Act and the Liquor Code, that they are removed from the regulation and control of the United

States, and that they are subject exclusively to the control and operation of the law of Colorado.

Aside from the diminution pro tanto which may be found in the Twenty-first Amendment in respect of the transportation of intoxicating liquor, Congress has plenary power under the Commerce Clause to regulate commerce among the several states. And that power is not confined in all cases to the regulation of interstate commerce. It extends in sweep to intrastate activities which affect interstate trade or the exercise of the power of Congress over it in such manner as to make the regulation of them necessary or appropriate for the protection of the free flow of interstate commerce. United States v. Darby, 312 U.S. 100.

A combination or agreement for price maintenance or which operates directly on prices or price structures of commodities moving in interstate commerce constitutes an unreasonable restraint within the Anti-Trust Act, without regard to whether the prices or price structure agreed upon are reasonable or otherwise, United States v. Trenton Potteries, supra; Ethyl Gasoline Corp. v. United States, 309 U.S. 436; United States v. Socony-Vacuum Oil Co., supra; United States v. Masonite Corp., 316 U.S. 265; one not fixing prices but intended unreasonably to restrict or restrain interstate commerce or which by its operation necessarily impedes the due course of such commerce comes within the act, Coronado Coal Co. v. United Mine Workers, 268 U.S. 295; one which contemplates restraint of interstate trade but to be effectuated by acts constituting intrastate activities is met with the condemnation of the act, Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n., 274 U.S. 37; Local 167, International Brotherhood of Teamsters v. United States, 291 U.S. 293; and one primarily local likewise finds itself within the ambit of the act if the means adopted to effectuate it operate to lay a direct and undue burden on interstate commerce, Indus-

trial Ass'n. v. United States, 268 U.S. 64. But a combination or concert, express or implied, limited in its objectives to intrastate activities, with no intent or purpose to affect interstate commerce, is without the reach of the act, even though there may be an indirect and insubstantial effect on interstate commerce. United Mine Workers v. Coronado Coal Co., 259 U.S. 344; United Leather Workers v. Herkert, 265 U.S. 457; Industrial Ass'n. v. United States, supra; Levering & Garrigues Co. v. Morrin, 289 U.S. 103.

The gist of the offense charged in the second count is the agreement or confederation, in violation of the Anti-Trust Act. Dealy v. United States, 152 U.S. 539; Williamson v. United States, 207 U.S. 425; Braverman v. United States, 317 U.S. 49; United States v. Safeway Stores, supra. And the offense cannot be charged in the general language of the statute. The indictment must descend to particulars and charge the constituent ingredients of which the offense is composed. It is not enough to charge in general language that a conspiracy was formed to raise, fix, and maintain retail prices, by raising, fixing, and stabilizing retail mark-ups and margins of profit in restraint of commerce among the states. A general charge of that kind in the language of the statute would not suffice. United States v. Safeway Stores, supra.

Obedient the necessity of doing so, the indictment descends to particulars and undertakes to charge the essential elements of which the offense is composed. But the agreement as pleaded is essentially one to fix and maintain prices at which alcoholic beverages shall be sold at retail in Colorado. Under regulation 12 C, supra, it is impossible for a retailer in that state to buy liquor from a producer. He can purchase it only from a wholesaler licensed under the laws of the state. Before liquor produced in other states can be acquired from the wholesaler title vests in the wholesaler at the time it crosses the state line com-

ing into the state, and the required stamps must be affixed by the wholesaler. And when it comes to rest in the ownership and custody of the wholesaler, is placed in the warehouse of the wholesaler for local disposition to the retailer, and is commingled with other merchandise, it ceases to be an integral part of interstate commerce. Industrial Ass'n. v. United States, supra; Walling v. Jacksonville Paper Co., 317 U.S. 564; Higgins v. Carr Bros. Co., 317 U.S. 572; Jewel Tea Co. v. Williams, 118 F.(2d) 202; Jax Beer Co. v. Redfern, 124 F.(2d) 172; Walling v. Goldblatt Bros., 128 F.(2d) 778; Allesandro v. C. F. Smith Co., 136 F.(2d) 75. And sales subsequently made by the wholesaler to retailers and in turn by retailers to the consuming public are wholly intrastate transactions. Jewel Tea Co. v. Williams, supra.

The control of the handling, the sales, and the prices at the point of origin before movement in interstate commerce begins, or in the state where it ends, may in some circumstances directly and unduly burden interstate commerce. Dr. Miles Medical Co. v. Park & Sons Co., 220 U.S. 373; Local 167, International Brotherhood of Teamsters v. United States, supra. But here it is not charged that the parties agreed and conspired to fix and maintain prices at which producers or others outside Colorado should sell their products to wholesalers within the state. Neither is it charged that it was a part of the agreement that producers should establish uniform prices from all producers and distillers to all wholesalers in Colorado of certain types, ages, or qualities of liquor moving in interstate commerce. No charge of that kind direct or remote is to be found in the indictment.

True, it is charged that it was part of the agreement that the retailers patronize only those producers and wholesalers who enter into fair trade contracts and withhold their patronage from those who fail to do so; that the retailers agree with the producers and wholesalers that retailers selling at prices lower

than those established in the fair trade contracts be deprived of the opportunity to purchase from the defendant producers and wholesalers; and that the defendant retailers threaten to boycott and do boycott producers and wholesalers who supply their products to retailers failing or refusing to observe such retail prices, mark-ups, and margins of profits. But the words "patronize" and "patronage" as used clearly refer to the purchase of beverages from producers and wholesalers. And it is perfectly obvious that these allegations are completely innocuous and ineffective in charging an offense under the Anti-Trust Act for the reason that, as previously said, retailers in Colorado cannot purchase from producers, and sales from wholesalers to retailers in that state are intrastate transactions.

The second count is completely barren of any allegations of fact effectively showing that the combination and agreement operated directly and substantially to restrict or burden the free and untrammeled flow of interstate commerce. The combination as pleaded was one intended to affect only intrastate activities. Its objective was control of domestic enterprise within the state, and it spent its direct and substantial force upon intrastate activities. Its effect, if any, on interstate commerce was indirect, insubstantial, and incidental. A combination of that kind lies beyond the reach of the Anti-Trust Act.

The judgments are severally reversed and the causes remanded with direction to dismiss the indictments as to these appellants.

A true copy.

Attest:

ROBERT B. CARTWRIGHT, Clerk
United States Circuit Court of Appeals, Tenth Circuit
[Seal] By GEORGE A. PEASE, Deputy Clerk.